TRANSCRIPT OF RECORD.

156-272

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 710.

GEORGE ANDREWS, APPELLANT,

vs.

BENJAMIN SWARTZ, SHERIFF OF THE COUNTY OF WARREN, IN THE STATE OF NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED MAY 25, 1894.

(15,594.)

(15,594.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 710.

GEORGE ANDREWS, APPELLANT,

vs.

BENJAMIN SWARTZ, SHERIFF OF THE COUNTY OF WARREN, IN THE STATE OF NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

INDEX.

	Original.	Print.
Petition and allowance of appeal	1	1
Citation	2	1
Assignment of error	3	2
Petition for writ of *habeas corpus*	4	2
Affidavit of George Andrews	12	6
Proceedings on motion to quash	13	7
Order refusing writ of *habeas corpus*	15	8
Indictment	16	8
Clerk's certificate	19	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1894.

1 In the Circuit Court of the United States, District of New Jersey.

GEORGE ANDREWS, Plaintiff and Appellant,
and
BENJAMIN SWARTZ, Defendant and Appellee.

The above-named plaintiff, George Andrews, considering himself aggrieved by the judgment entered on this seventeenth day of April, in the year eighteen hundred and ninety-four, in the above-entitled proceedings, doth hereby appeal from said judgment to the Supreme Court of the United States, and he prays that this appeal be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

GEO. M. SHIPMAN,
Att'y for Plaintiff and Appellant.

And now, to wit, on the seventeenth day of April, A. D. 1894, this appeal is taken and allowed as prayed for by and in pursuance of the statute in such case made & provided.

EDW. T. GREEN, *J.*

United States circuit court, district of New Jersey. *In re*, etc., George Andrews. Petition and allowance of appeal. Geo. M. Shipman, att'y. Filed Apr. 17, 1894.

2 By the Honorable Edward T. Green, judge of the district court of the United States and *ex officio* judge of the circuit court of the United States in the third circuit in and for the district of New Jersey, to Benjamin Swartz, sheriff of the county of Warren, in the State of New Jersey:

Whereas George Andrews has lately appealed to the Supreme Court of the United States from a judgment lately rendered in the circuit court of the United States for the district of New Jersey, made in favor of you, the said Benjamin Swartz, sheriff of the county of Warren, in the State of New Jersey, you are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the seventeenth day of May next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Trenton, in the district of New Jersey, in the third circuit, the seventeenth day of April, in the year of our Lord one thousand eight hundred & ninety-four.

EDW. T. GREEN, *J.*

[Endorsed:] United States Supreme Court. George Andrews, appellant, *vs.* Benjamin Swartz, sheriff, &c. Citation. Received, April 18th, A. D. 1894, a copy of the within citation under the seal of the United States circuit court for the district of New Jersey. Benj. Swartz, sheriff.

3 In the Supreme Court of the United States, March Term, in the year of our Lord one thousand eight hundred and ninety-four.

GEORGE ANDREWS, Plaintiff and Appellant,
vs.
BENJAMIN SWARTZ, Defendant and Appellee.

Afterwards, to wit, on the seventeenth day of April, in the year eighteen hundred and ninety-four, in this same term, before the justices of the Supreme Court of the United States, at the Capital, in Washington, District of Columbia, comes the said George Andrews, by his attorney, and says that in the record & proceedings aforesaid there is manifest error, in this, to wit, in refusing to issue the writ of *habeas corpus* as prayed for—

Whereas by the law of the land the judgment ought to have been given for the plaintiff against the said defendant, and that the said plaintiff prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgement.

GEO. M. SHIPMAN,
Attorney for Plaintiff in Error.

Endorsed: United States circuit court, district of New Jersey. George Andrews *vs.* Benjamin Swartz. Assignment of error. Geo. M. Shipman, att'y for pl'ff. Filed Apr. 17, 1894.

4 To the honorable the judges of the circuit court of the United States of America:

The petition of George Andrews, a citizen of the United States, being a citizen of the State of New Jersey and of the county of Warren, in said State, respectfully shows that your petitioner is now in the common jail of the county of Warren, in the custody of Benjamin Swartz, Esquire, sheriff of the county of Warren and State of New Jersey, at Belvidere, in said county of Warren; that your petitioner is a citizen of the United States, of the African race, and a colored man; that he was *commited* of the crime of murder in the first degree in the court of oyer & terminer of the county of Warren & State of New Jersey; that he was so *commited* of murder in the first degree on the fourteenth day of February, in the year eighteen hundred and ninety-four; that on the twenty-fourth day of February, 1894, petitioner was sentenced to be hung, at Belvidere, on the fifth day of April, in the year 1894; that by a reprieve granted by the governor of the State of New Jersey the time for the execution of petitioner was extended until the nineteenth day of April, in the year eighteen hundred & ninety-four; that a death warrant has been issued for the execution of your petitioner on said last-named day, and he is now in the custody of the sheriff of Warren county awaiting the time of his execution; and petitioner further shows that he was indicted at the December term, 1893, of the court

of oyer & terminer of Warren county by a grand jury summoned by the sheriff of the county of Warren; that petitioner was charged upon his indictment on the fifth day of January, A. D. 1894;
5 that at the time he was charged and before he pleaded he asked, by his counsel, for leave to move to quash the indictment or to dismiss the said indictment & to discharge petitioner from said indictment; that the court gave counsel of petitioner until January 9th, 1894, to make his motion as aforesaid, and that on that day the counsel of your petitioner moved to quash the indictment and to discharge this petitioner from said indictment and to discharge this defendant from said indictment; that the court then & there refused said motion & refused to hear counsel of petitioner and informed counsel for petitioner that his motion which he had asked to make when petitioner was arraigned did not include anything except a motion to quash on the face of the indictment, and no application for leave to take affidavits could or would be allowed; that the object of petitioner's application was and what he offered to prove was and it is a fact, as petitioner now alleges, that by the statute of the State of New Jersey the sheriff of the county of Warren has the exclusive right to select the grand jury, who shall find indictments, and that — the statute of the State of New Jersey the sheriff has, in the first instance, the exclusive right to select the petit jurors, who shall — by indictments found & presented by the grand jury; and your petitioner alleges that section 36, page 273, of the Revised Statutes of New Jersey requires that the sheriff shall call twenty-four good & lawful men from the body of the county to serve as grand jurors; and section 13, on page 533, of the Revised Statutes of New
6 Jersey requires that the sheriff shall select names of jurymen to serve as petit jurymen from a list of names of residents of the county qualified to serve as jurors made up by himself; and petitioner shows that from the panel and list of jurors which was selected by the sheriff of the county of Warren alone for the term of December, 1893, all persons of African descent & of color were excluded; that they were purposely excluded by the sheriff of Warren county.

And petitioner shows that from the panel & list of petit jurymen from which the list of petit jurymen was selected & drawn for the trial of indictments for the term of December, 1893, by the sheriff of Warren county colored men & men of African descent were purposely excluded by said sheriff; that in the selection of his grand jury for the term of December, 1893, and in the selection of names to be drawn as petit jurymen for the same term the names of citizens of African descent & of men of color were purposely excluded; and petitioner further shows that the statutes of the State of New Jersey above cited require that the sheriff shall select from the citizens and residents of the county twenty-four good & lawful men from the body of the county to serve as grand jurors, and also that he shall select from a list in a book kept by himself & made up by himself — the names of citizens & residents of the county qualified to serve as jurors a certain number of names, which names shall be drawn out

in presence of the court; and petitioner shows that citizens & residents of Warren county of African descent — of color have always been excluded from serving as jurymen, both petit & grand
7 jurymen; that at the time the sheriff of Warren county selected the grand jury which found the indictment against this petitioner and also selected the petit jury there were — citizens & residents of the county of Warren qualified to do jury duty from one to four thousand citizens of African descent & of color, and that the sheriff of Warren county purposely excluded the names of these citizens from his selection of men to serve on his grand jury as aforesaid in December term, 1893, and from the list of names selected to be drawn as petit jurors for said term, and that citizens of African descent have always been excluded from serving; and petitioner says he had no knowledge of the facts, and that the sheriff of Warren county actually excluded men of his race & color from the grand jury until he was actually indicted & called upon to plead; that he did not know who the grand jurymen were until after they were drawn, and that he took the first opportunity he had to object to the action of the said grand jury & to prove the facts which come to his knowledge in reference to the selection of said grand jury, and he insists that the action of the grand jury in indicting him was void & the court without jurisdiction — *they* him upon said indictment found & presented by a grand jury selected as that grand jury was chosen as grand jurors and as petit jurors in the county of Warren & State of New Jersey.

And petitioner shows that when he was arraigned & charged upon his indictment for murder he called the attention of the court
8 to the manner of selecting jurors and to the fact that citizens of African descent were purposely excluded by the sheriff of Warren county from the grand jury which found the indictment & from the petit jury summoned to try petitioner, and asked for an order of the court to take testimony to prove his allegations, and that according to the law & practice of the court petitioner's application should have been entertained & decided upon the merits, and he should have been permitted to take testimony to show the unjust and illegal action of the said sheriff of Warren county, but that the court absolutely refused his motion & refused to hear the proof which petitioner offered himself ready to make & produce, and compelled him to go to trial, and a copy of the proceedings before the court is hereto annexed & made part of this petition, and that petitioner was convicted, and that by reason of such action of the court in permitting petitioner to be tried by a jury from which citizens of African descent were purposely excluded he was deprived of the rights & privileges which white persons would enjoy and to which the petitioner is justly entitled.

Petitioner shows that he applied to the chancellor of the State of New Jersey for a writ of error, according to the statutes in such case made & provided, afterwards and on the sixth day of March, A. D. 1894, on the ground herein stated amongst others, but that the chancellor declined to grant a writ of error; that by the laws of the State of New Jersey a writ of error is a writ of grace & not a writ of right,

and that application must be made to the chancellor therefor, and that by the action of the chancellor in refusing petitioner's
9 application for said writ of error he is estopped from having the verdict rendered in his case on the validity of any question that arose during said trial or within — question acted upon, or to grant petitioner any relief from the unjust and illegal action of said sheriff as aforesaid; and petitioner shows that by the action of the sheriff of the county of Warren & State of New Jersey and by the action of the court in refusing him relief in the premises he has been deprived of all the just rights of a citizen of the United States and of the equal protection of the laws, and is in the like manner deprived of his liberty and is about to be deprived of his life.

Petitioner shows that the power of selecting jurors under & by virtue of the statutes of the State of New Jersey is entirely with the sheriff of the county; that he has the power to select the grand jury, who find bills of indictment, & the petit jury, who try criminals, are selected in the first instance by him alone, and that the said sheriff did in the selection of grand jurors for the term of December, 1893 purposely exclude in his selection color-d citizens of the county of Warren & State of New Jersey, and also in the selection of petit juryman he used his power to exclude juryman, and that your petitioner was in custody of said sheriff when he selected his grand jury for the December term, 1893, & when he selected his petit jury, and that petitioner was in his custody charged with murder, but the said sheriff nevertheless excluded citizens of the same race & color as petitioners.

10 And petitioner shows he was entitled to show the illegal action of the said sheriff, and the court erred in not permitting petitioner so to do.

Petitioner shows there is no other cause for his detention, and that his detention is illegal because, amongst other things—

First. He is of African race & black in color; that all persons of his race & color were excluded in the drawing of the grand jury which indicted him and from the petit jury which were summoned to try him, and that the sheriff of Warren county, New Jersey, who by the law of said State has sole power to select said jurors, purposely excluded such citizens of African descent.

Second. That by reason of such exclusion petitioner was denied the equal protection of the laws and did not have the full & equal benefit thereof in the proceedings for the security of his life & liberty as is enjoyed by white persons and to which he is justly entitled.

Third. That all persons of African race & of color were excluded from the grand jury by which the indictment against the defendant was found & upon which he was tried and, consequently said indictment was illegal & void and petitioner ought not to have — put to trial upon said indictment, and the trial court was without jurisdiction, and that said persons were qualified in all respects to act both as jurors and grand jurors, but were purposely excluded & always have been by the sheriff of Warren county.

11 Your petitioner therefore prays that the court will grant to him the writ of *habeas corpus* according to the statute in such case made & provided and will inquire into the cause of said imprisonment and vacate & set aside the said verdict of guilty and stay the judgment of conviction, and that the petitioner may have a new trial, and that he may be discharged from the said imprisonment, and, further, will grant a writ of certiorari to the court of oyer & terminer of the county of Warren, commanding them to certify to this court true copies of the lists of grand & petit jurors for the term of December, 1893, and of the indictment and other proceedings in said cause of the State *vs.* George Andrews under & by virtue of which petitioner is held in custody.

his
GEORGE x ANDREWS, *Petitioner.*
mark.

NEW JERSEY, *ss:*

George Andrews, the petitioner above named, being duly sworn, on his oath says he is the petitioner above named and that the petition is in all respects true as is above stated & set forth.

his
GEORGE x ANDREWS.
mark.

Sworn & subscribed before me April 13, 1894.

GEO. M. SHIPMAN,
Notary Public of New Jersey.

Endorsed: U. S. circuit court, district of New Jersey. George Andrews *vs.* Benjamin Swartz. Petition for writ of *habeas corpus.*

12 NEW JERSEY, }
Warren County, } *ss:*

George Andrews, being duly sworn, on his oath says he is now confined in the jail of Warren county, at Belvidere; that he was indicted for murder at the present term of the Warren county oyer & terminer; that defendant is a colored man of African descent; that defendant is informed that no colored man was summoned or did serve upon the grand jury which indicted him or has been summoned to serve upon the petit jury which will try defendant; that the persons summoned on said juries are exclusively white persons. Defendant says he is informed that there are about twenty thousand colored citizens in Warren county who are qualified to serve as jurors, but that the sheriff of the county of Warren never has selected a colored man to sit upon juries, either grand or petit, but that he selects his jurors exclusively from white citizens & excludes colored citizens, & did so at this term of the court.

his
GEORGE H. x ANDREWS.
mark.

Sworn & subscribed before me Jan'y 9, 1894.

GEO. M. SHIPMAN,
M. C. C. of N. J.

13 Warren County Oyer and Terminer.

THE STATE
vs.
GEORGE ANDREWS.

BELVIDERE, N. J., *January* 9, 1894.

Mr. G. M. SHIPMAN: The point I desire to make in the matter of the murder charged against George Andrews is, I move to quash the indictment and dismiss the indictment because the defendant at the bar is a colored man, a citizen of this county, and has the right, as I insist, to be represented upon the grand jury in his race. The law requires that the sheriff shall select from the citizens of the county so many men—twenty-four men. I refer, your honor, in the first place to the statutes—the sheriff shall call twenty-four good and lawful men to serve as grand jurors from the body of the county. So says the revision, page 273. Sec. 36 requires that jurors summoned shall be citizens of the State and residents of the county, and section 13, on page 533 of the revision, requires that the names put in the box shall be selected from the names of the residents of the county qualified to serve as jurors. My insistment is that there are in this county at least five thousand colored citizens, and that they are excluded from the grand jury and from the petty jury, and I ask for a rule to take testimony to show that they are so excluded, and on that ground to dismiss and quash this indict-

14 ment. I cite for authorities *In re* Wood, 140 U. S. Reports, page 278. That was a case from New York.

The COURT: The only thing that was reserved after defendant pleaded was to quash the indictment?

Mr. SHIPMAN: And to dismiss.

The COURT: I will overrule the motion. I do so on the ground that the party pleaded and went to issue and reserved the right to move to quash, not to take testimony in the case or anything like it, but quash from what is on the face of the indictment—the caption and everything else.

Mr. SHIPMAN: I also cite, your honor, Neal *v.* Delaware. The only time to make the motion—and so I cite from this authority—is at the trial or when the man was called to be charged, and I asked to make a motion and your honor said you would hear me today.

The COURT: I said I would hear you on a motion to quash, and I didn't say I would hear you on anything else. I am not going to take testimony on this question. I didn't reserve that and I never meant to do it, and there was no suggestion about taking testimony until this minute.

Mr. SHIPMAN: The only question, of course, is the motion to quash, and of course I can't prove the facts unless I take testimony.

The COURT: I am not going to quash on that ground, because I didn't reserve that question. Any other point?

Mr. SHIPMAN: That is the only point, and of course I want to make it in due form.

15 The COURT: You have made your motion to quash and I overrule it.

Exception allowed.

(Endorsed.)

The writ in this case is refused because, in my opinion, it appears from the petition that the petitioner is not entitled thereto.

Dated April 17, 1894.

EDW. T. GREEN, *J.*

Filed Apr. 17, 1894.

16 Warren Oyer and Terminer, December Term, 1893.

WARREN COUNTY, *To wit:*

The grand inquest for the State of New Jersey and for the body of the county of Warren upon their oath present that George Andrews, late of the borough of Washington, in the said county of Warren, on the twenty-eighth day of October, in the year of our Lord eighteen hundred and ninety-three, at the borough of Washington aforesaid, in the county aforesaid, and within the jurisdiction of this court, with force and arms, in and upon one Hessie Andrews, alias Hessie Thompson, wilfully, feloniously, and of his malice aforethought, did make an assault, and her, the said Hessie Andrews, alias Hessie Thompson, then and there, wilfully, feloniously, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

And the grand inquest aforesaid upon their oath aforesaid do further present that the said George Andrews, on the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and ninety-three, in the borough of Washington and county aforesaid and within the jurisdiction aforesaid, with force and arms, in and upon one Hessie Andrews, alias Hessie Thompson, wilfully, feloniously, and of his malice aforethought, did make an assault, and that he, the said George Andrews, with a certain razor, made of iron and steel, which he, the said George Andrews, in his right hand then and there had and held, the throat of her, the said Hessie Andrews, alias Hessie Thompson, wilfully, feloniously, and
17 of his malice aforethought, did strike and cut, and that the said George Andrews, with the razor aforesaid, by the striking and cutting aforesaid, did then and there give to her, the said Hessie Andrews, alias Hessie Thompson, in and upon the said throat of her, the said Hessie Andrews, alias Hessie Thompson, one mortal wound, of which said mortal wound the said Hessie Andrews, alias Hessie Thompson, on the said twenty-eighth day of October, in the year aforesaid, at the borough of Washington aforesaid, in the county aforesaid, died; and so the jurors aforesaid upon their oath aforesaid do say that the said George Andrews her, the said Hessie Andrews, alias Hessie Thompson, in manner and form aforesaid,

wilfully, feloniously, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

WM. A. STRYKER,
Prosecutor of the Pleas.

STATE OF NEW JERSEY, } ss:
County of Warren, }

I, John A. Wildrick, clerk of the county of Warren aforesaid, and also clerk of the court of oyer and terminer and general jail delivery in and for said county of Warren, do hereby certify the foregoing to be a true copy of a certain indictment on file in my office.

In witness whereof I have hereunto set my hand and
[L. S.] affixed the official seal of said county and court this twenty-
ninth day of January, A. D. 1894.
18 JOHN A. WILDRICK, *Clerk.*

(Endorsed:) Warren oyer and terminer, December term, 1893. Indictment for murder. The State *vs.* George Andrews. Wm. A. Stryker, prosecutor of the pleas. A true bill. Elias J. Mackey, foreman. Filed Jan'y 5, A. D. 1894. John A. Wildrick, clerk.

19 UNITED STATES OF AMERICA, } ss:
District of New Jersey, }

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true, and complete transcript of the record in the cause of George Andrews against Benjamin Swarts, as the same appears on file and of record in my office.

In testimony whereof I have hereunto
The Seal of the U. S. Circuit Court, Dist. of New Jersey. set my hand and affixed the seal of said court, at Trenton, in said district, this fifteenth day of May, A. D. 1894.

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: Case No. 15,594. New Jersey C. C. U. S. Term No., 710. George Andrews, appellant, *vs.* Benjamin Swartz, sheriff of the county of Warren, in the State of New Jersey. Filed May 25th, 1894.

MacCrellish & Quigley, Printers, Trenton, N. J.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 710.

GEORGE ANDREWS,
Appellant,
vs.
BENJAMIN SWARTZ, SHERIFF OF THE COUNTY OF WARREN, IN THE STATE OF NEW JERSEY.

BRIEF OF GEORGE M. SHIPMAN, FOR APPELLANT.

This is an appeal from the judgment of the Honorable Edward T. Green, Judge of the District Court of the United States for the District of New Jersey, sitting as in the Circuit Court of the United States, refusing to allow a writ of habeas corpus to bring up the body of George Andrews, the appellant in this cause.

The record in this case shows that George Andrews is a colored man, of African descent; that he is a citizen of the United States, and of the county of Warren and State of New Jersey; that he was indicted for murder in the first degree at the December Term of the Court of Oyer and Terminer and General Jail Delivery, December Term of 1893; that he was charged upon his indictment on the fifth day of January, 1894; that when he was called upon to plead to his indictment he asked leave to move to quash the indictment, and leave was granted that such a motion be made on the ninth day of Jan-

uary, 1894, then next, and he had permission to withdraw his plea of "not guilty" for that purpose.

The motion was made on January ninth to quash the indictment, and to discharge the defendant from custody under the indictment, on the ground that the sheriff of the county of Warren, who had the sole and absolute power to select the grand jurors, who found the bill of indictment, and the petit jury which had been selected for that term to try the prisoner, had in the selection of the said juries discriminated against the defendant and had purposely left the names of colored citizens off of said juries, had purposely left their names out of the box when the petit jury had been summoned, and had purposely refrained from selecting colored citizens to act upon the grand jury. The prisoner, by his counsel, offered to prove by competent testimony then and there in the presence of the Court, that the said sheriff had excluded colored men from the grand and petit jury for that term; that he had done so purposely; that he had not put the names of colored men in the box when the petit jury was impaneled for the reason that the prisoner was to be tried, and that there were colored citizens in the county of Warren who were fit to serve as petit jurymen and as grand jurymen, but the sheriff had left them off purposely, and would not summon colored men, citizens of Warren county, but left them off in order that the prisoner might the more easily be convicted.

The statutes of New Jersey concerning the selection of jurors are as follows: Section 36 of Criminal Procedure Act, found on page 273 of Revised Statutes of New Jersey, provides—

"The respective sheriffs of the several counties of this State shall cause to come before the said Court of Oyer and Terminer and General Jail Delivery, at the times and places of holding their said respective courts, twenty-four good and lawful men to serve as grand jurors, and so many good and lawful men to serve as petit jurors as shall be necessary, and without any precept being issued for that purpose."

The statute concerning the selection of petit jurors is as follows—Section 6, page 532, of Revised Statutes of New Jersey: "That every person summoned as a grand juror in any court of this State, and every petit juror returned for the trial of any action of a civil or criminal nature, shall be a citizen of

this State, and resident within the county from which he shall be taken, and above the age of twenty-one, and under the age of sixty-five years, and if any person who is not so qualified shall be summoned as a grand juror or as a juror on the trial of any such action in any of the courts of this State; or if any person shall be summoned as a petit juror at any stated term of any court of this State who has served as such at any of the three stated terms next preceding that to which he may be summoned, it shall be good cause of challenge to any such juror who shall be discharged, upon such challenge being verified according to law, or his own oath or affirmation in support thereof; provided that no exception to any such juror on account of his citizenship, or age, or any other legal disability, shall be allowed after he has been sworn or affirmed.'

Section 7—"That it shall be the duty of the respective sheriffs of the several counties of this State (at their own expense) to procure every year a list of names of the persons who in their respective counties are qualified to serve as jurors, with their places of abode, by designating their townships and wards; said list to be made out and completed by the first day of January in each year, and kept in the respective offices of the said sheriffs, open to the inspection of all persons who may wish to examine the same, without charge; and any sheriff who shall neglect or refuse to comply with any or all of the provisions of this section shall forfeit the sum of five hundred dollars for every such offense; the one-half to be paid to the State and the other half to any person who shall prosecute for the same, to be recovered with costs by action of debt in any court of record having cognizance of the same."

Section 13, on page 533: "That it shall be the duty of each sheriff in this State, or in case of his death, for the coroner or person chosen by the court, on the fourth Tuesday before the regular term of any Circuit Court, Court of Oyer and Terminer and General Jail Delivery, Common Pleas and Quarter Sessions of the Peace, to be holden in each county, at the court house in each county, in the presence of the County Clerk, and before the Court of Common Pleas, which shall meet at the hour of ten o'clock in the forenoon of said day, in open court, to select from among the residents of the county qualified to serve as jurors, the names of at least twice as many persons as the said Court

shall deem necessary to be summoned as jurors, at the next ensuing term of the aforesaid courts, and the names so selected shall be written on separate pieces of paper, which pieces of paper shall be separately folded so as to conceal the name of each juror put into a box, and which, when so folded, shall be of the same size, color and shape as nearly as can be, after which the said box shall be closed and shaken in such a manner as to intermingle the pieces of paper so folded as aforesaid and put therein; and the said sheriff, &c., shall, in an open and public manner, in the presence of the Clerk and Court, and such other persons as shall choose to be present on the occasion, draw out of the box separately as many of the said papers as the number of jurors the said court shall deem necessary to summon as aforesaid, which names shall be publicly announced as drawn, and transcribed by the clerk as they are read by the person drawing them from the box, and the several persons whose names shall be so found written on the papers so drawn out shall constitute the general panel of jurors to be summoned by the said sheriff or elisors, &c., at the next ensuing term of said court; and the sheriff, coroner or elisors, &c., shall cause two complete lists to be made of the names so drawn, and certify the same under his hand to be the panel of jurors selected to serve at such ensuing court or courts."

It is a fact, and it was offered to be proved that when the jurors for the December term of 1893 of the Warren county courts were selected, there were citizens of the county of Warren who were colored—of African descent—qualified in every way to be selected as jurymen, and that they had been citizens of different parts of the county for many years; and that the defendant was in custody, charged with murder of his wife, when the jury, both grand and petit, was selected for the December term, 1893. The sheriff of Warren county refused to select these men. He purposely left them off in the selection of his grand and petit jurors. He excluded colored men in order that defendant might be convicted the more easily and for other reasons. Defendant offered to prove all these things.

I insist that the Court should have quashed the indictment found by the grand jury selected as this one was, and should have discharged the defendant from the indictment.

The Court refused to entertain the motion at all.

Page 7 of the record shows that the Court refused to quash on the ground stated because the question was not reserved, and would only entertain a motion to quash on what appeared on the face of the indictment.

A writ of *habeas corpus* was applied for in this cause on the ground that the Court in refusing this motion—in refusing to entertain the motion at all—deprived the prisoner of a right, a right secured to him by the Constitution of the United States. That the trial court had no jurisdiction over the defendant at all if he could prove what he alleged he could. That a jury selected as the jury chosen to try him could not find a valid verdict; that judgment could not pass against him upon their verdict. The only remedy defendant had was by writ of *habeas corpus.*

The Revised Statutes of the United States (see section 753) provides that the writ of *habeas corpus* shall in no case extend to a prisoner in jail, *unless where he is in custody in violation of the Constitution* or of a law or treaty of the United States.

In this case defendant is in custody in violation of the Constitution of the United States, for he stands convicted upon the verdict of a jury which was selected contrary to the statutes of the State of New Jersey and contrary to the principles of the Constitution of the United States.

The statutes of New Jersey concerning juries, which I have printed, show that the sheriff has the power to discriminate; that he can exclude. A criminal can have no cause for complaint because men of his own race are not on a jury, it is true. But if an Irishman could prove that a sheriff in selecting a jury had purposely left off men of his race he would certainly have the right to complain, and so, if the sheriff purposely left off black men in the selection of this jury, every act of the jury so selected in relation to defendant was void. This Court has passed upon this question in several cases.

In the case of *Virginia* v. *Rives, 100 United States Reports, page 313*, the Court, on page 321, uses the following language: "If, as was alleged in the argument, the officer to whom was intrusted the persons from whom the juries for the indictment and trial of the petitioner were drawn disregarding the statute of the State confined his selection to white persons, and refused to select any persons of the colored race solely because of their color, his

action was a gross violation of the spirit of the State laws as well as of the act of Congress of March 1st, 1875, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State and was prohibited by the Constitutional Amendment."

A mixed jury is not in a particular case always or absolutely necessary. A black man cannot claim. of course, as a matter of right, that his race shall have a representative on the jury. But it *is* a right to which a black man is entitled that in the selection of jurors to pass upon his life, liberty or property there shall be no exclusion of his race and no discrimination against them because of their color.

In this case the defendant was tried upon his indictment on February 14th, 1894, a month and more after he was called to plead. Before he was called to plead he asked leave to move to quash; before he was put on his trial he asked to be discharged from the indictment and that the indictment be quashed. The motion was made on January 9th. He did not go to trial until February 14th. He offered to show over a month before the time fixed for his trial that the sheriff had not only left colored men off of the panel which he selected—for that he could not complain of—but that he had purposely left off men of his race, had actually excluded colored men when he made up his grand jury and selected his petit jury. Had purposely acted in a way which deprived the defendant of his right, and in a case in which the liberty of a man is at stake a jury had been selected for the very purpose of injuring him.

I cite also—

> *Strauder* vs. *West Virginia, 100 U. S. Reports, 303; Ex parte Virginia, 100 U. S., 339; Neal* vs. *Delaware, 103 U. S. 370; Revised Statutes of United States, Section 1977; Section 1 of Article XIV. of the Constitution of the United States; the Fourteenth Amendment to the Constitution.*

I insist that the proper way to bring this matter to the attention of the Court is by *habeas corpus*, for the reason that the Court below refused to entertain the motion at all. The Court did not consider the motion. There was no action of the Court to which a legal exception could have been taken. The Court

ignored the motion. The defendant had no remedy in a higher court, for the Court refused the motion without considering the merits of the motion at all. The Court by their action abridged the rights of the defendant, and he had no remedy except to go to the United States Court and by writ of *habeas corpus* get his testimony before the Court. His motion depended upon the proof which he had, and he could only offer it upon an investigation before some proper tribunal.

The Circuit Court of the United States by a writ of *habeas corpus* has the power, after a State Court has finally acted upon a case, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States.

Ex parte Royal, 117 U S. Reports, pages 241, 252, 253, 250.

Ex parte Yerger, 8 Wallace, page 85.

In the case of *Neal* v. *Delaware*, which I have already cited, the Court fully sustain the position I take in reference to the right of a colored citizen not to be discriminated against; that although his right to a mixed jury in a particular case is not within the meaning of the Constitution always or absolutely necessary to the equal protection of the laws, it *is* a right to which he is entitled "that in the selection of juries to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them because of their color."

See *page 394 of 103 U. S. Reports.*

Here the charge was distinctly made to the Court when the prisoner was arraigned that the sheriff of the county, who certainly had and has the power under the statutes of New Jersey to discriminate, to exclude whom he will, and to select whom he will—that this sheriff had purposely left colored men, otherwise qualified in every way to serve as jurors, off of his panel because they were colored. The charge was that he always and systematically left colored men off of his list which he was bound to make up in his book, for an examination of the sheriff's book will show that no colored man was ever put on the book, nor was a colored man ever selected as a juror by any sheriff of Warren county.

In this particular case it was in the power of defendant to prove that the sheriff in selecting his grand jurors and his peti

jury purposely left off colored men. This action infringed the right of this defendant as a citizen of the United States under the Constitution. All the authorities cited by me hold so. It was a violation of the constitutional rights of this defendant.

The defendant was in custody in violation of the Constitution of the United States, and when the Court where he was held refused to hear him, he was entitled to be brought by writ of *habeas corpus* before a Judge of the United States Court to have this charge inquired into.

He was held by a State officer, who violated a United States statute. That was the allegation, and the United States Court was bound to inquire whether the allegation was true or false.

A very few moments would have convinced the trial court in this case whether the allegation made by this defendant was true or without foundation. In refusing the inquiry in a case where a man's life is at stake, the Court took a responsibility which will not be overlooked.

The defendant in this cause applied for a writ of error to the State court, but it was denied him, and that is alleged as a violation of the constitutional right of this defendant.

By the statute of the State of New Sersey (see Revised Statutes of New Jersey, page 283, section 83, of Criminal Procedure), it is provided as follows:

"Writs of error in all criminal cases not punishable with death, shall be considered writs of right, and issue of course; and in criminal cases punishable with death, writs of error shall be considered as writs of grace, and shall not issue but by order of the Chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the Attorney-General or the prosecutor of the State."

I insist that this provision of the law, in making a writ of error a writ of grace in capital cases a writ of right in every other criminal case, is a violation of the constitutional right of every citizen.

By the Common Law of England a writ of error was a prerogative of the crown. It was not allowed without the fiat of the Attorney-General, and originally when the writ of error was granted the Attorney-General never made opposition, because either he had certified there was error, and then he

could not certify against his own certificate, or the crown meant to show favor and then he had orders not to approve.

Under the Constitution of New Jersey every litigant has a right to have his cause heard by the Court of Errors and Appeals.

The Constitution adopted on July 2d, 1776, contained the provision "That the Governor and Council (seven whereof shall be a quorum) be the Court of Appeals in the last resort in all causes of law as heretofore."

See *Revised Laws of New Jersey, Edition of 1821.*

The law by which a writ of error was made a writ of grace was not passed until 1795:

"An act regulating proceedings and trials in criminal cases," passed the sixth of March, 1795.

See *page 184 of Laws of New Jersey, Edition of 1821.*

Section 13 of that act contains the provision which is found in the present Criminal Procedure act of the State.

The Constitution adopted in 1875, provides in Article VI, Section 1: The judicial power shall be vested in a Court of Errors and Appeals in the last resort *in all causes* as heretofore.

Section 2. The Court of Errors and Appeals shall consist of the Chancellor, the Justices of the Supreme Court and six Judges, or a major part of them, which Judges are to be appointed for six years.

See *pages XL and XLI, Revised Statutes of New Jersey.*

This provision gives every litigant a right to prosecute a writ of error to have his cause heard by the Court of Errors and Appeals. The statute, section 83 printed above, abridges this right and requires litigants in certain cases to submit their causes to the judgment of a single member of the court of last resort, and his judgment, if the writ is refused, is final.

The statute really constitutes a court It makes of the Chancellor a court and gives him power to determine a cause in advance of the court of last resort.

I find that in many States a writ of error is not allowed in a capital case without notice and an order of the Court. But in no State do I find a constitutional provision such as there is in New Jersey—a provision which gives to every man a right

to have his cause heard by writ of error in the court of last resort.

Just think of it—a man convicted of petty larceny can take a writ of error by right of a man whose life is at stake. Must submit his case to the decision of a Court whose judgment, if adverse, cannot be reviewed!

A man convicted of a capital crime cannot take a writ of error. His life is at stake, but he cannot have his case reviewed unless one member of the court of last resort is applied to. The statute requires that a motion be made before him, a petition filed and then he passes upon the case and makes an order which cannot be reviewed. The statute makes one member of a court into a court with absolute power to decide, and no review can be had of his decision.

The provision of the statute is, too, that a writ of error shall be allowed in a capital case only on motion or petition to the Chancellor, and he shall make an order if he allows the writ. He is constituted a court.

I insist this provision is in violation of the constitutional rights of every citizen, and that the Courts of the United States are bound to relieve those who are deprived of liberty under such a provision as the statute makes in this case.

I have examined carefully the statutes of many States. I can find no provision such as the one on our statute book. I find statutes in many States which require that a writ of error in a capital case shall be had only when allowed by a Judge of the Supreme Court or of the court of review, but in no State is there a constitutional provision such as there is in the State of New Jersey, making the Court of Errors and Appeals a court of last resort in *all causes*. Here in New Jersey the statute makes a writ of error in a capital case a writ of grace against the express terms of a constitutional provision.

In 1878 the Legislature of New Jersey passed a law declaring writs of error writs of right in all causes, and that they issue of court.

See supplement to Revision of New Jersey, page 209, section 10.

This law was declared unconstitutional in the case of *Entrie* v. *State*, *47 N. J. Law, 18 Vroom 140*, for the reason that by its terms a writ of error could be taken directly to the Court of

Errors and Appeals from the Court of Oyer and Terminer. The Court held the writ must go first to Supreme Court.

I insist that this law which makes writs of error a writ of grace in a capital case is a violation of the personal rights of the citizen under the Constitution of the United States.

The Court will see, too, that the defendant had no remedy in the State court for this wrong, which was inflicted by the illegal action of the sheriff in selecting his jury. He had no remedy except to apply for a writ of *habeas corpus*, for he could not take a writ of error to the court of last resort in New Jersey from the Supreme Court of the United States, for he could not get the judgment of that court. His application for a writ of error was denied by the Chancellor.

I submit this case to the Court. The facts, of course, are not here. The charge was that the defendant murdered his wife in a dwelling-house on the streets of the town of Washington, New Jersey, at five o'clock in the afternoon of a November day. He was arrested. Feeling ran high against him, and when he came to trial he found that men of his own color had been purposely excluded from the panel of jurors to try him. I insist that the court below did wrong in refusing to allow a writ of *habeas corpus* in order that this serious allegation might be investigated and that the judgment of the Court should be reversed.

GEO. M. SHIPMAN,
Attorney of Appellant.

156-272

Office Supreme Court, U. S.
FILED.
JAN 21 1895
JAMES H. McKENNEY,
CLERK

156-272

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 710.

GEORGE ANDREWS, APPELLANT,

against

BENJAMIN SWARTZ, SHERIFF OF THE COUNTY OF WARREN, IN THE STATE OF NEW JERSEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE.

WILLIAM A. STRYKER,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

GEORGE ANDREWS,
Appellant,
vs.
BENJAMIN SWARTZ, Sheriff, &c.
Appellee.

BRIEF OF WILLIAM A. STRYKER, ATTORNEY FOR APPELLEE.

STATEMENT OF FACTS.

The record in this cause does not show all the material and necessary facts requisite to a proper understanding of the case, and to supply the omission, I desire to add such facts as shall present the true status of the matter before the court on this appeal.

The appellant was arrested and committed to the county jail in October, 1893, charged with the murder of his wife, Hessie Andrews, at Washington, New Jersey, there to await the action of the Grand Jury at the ensuing term of the Court of Oyer and Terminer in and for the county of Warren, which court convened on the first Tuesday after the fourth Tuesday in December following.

The Grand Jurors summoned by the Sheriff were, on the day last mentioned, called and sworn in open court, and neither the said jury or jurors were challenged or objected to by the appellant or anyone in his behalf, although the said appellant knew that the charge of murder against him was then and there to be presented to said jury.

The record of the Warren Oyer and Terminer, as presented in the transcript, does not show the proceedings of the said Court prior to January 9, 1894.

The Grand Jury presented an indictment against the appellant and on the 5th day of January, 1894, he was brought before said Court and said indictment was then and there read to him, and he then and there, in the presence of his counsel, entered a plea of *not guilty* thereto, and the Court fixed February 12th, 1894, for the trial of the issue joined, subject to a motion to be made to *quash the indictment* on the 9th day of January, 1894.

On the 12th day of February the appellant was placed upon trial, having been previously served with a certified copy of said indictment and list of petit jurors who were subject to call at said term, and no objection or challenge was made to the array or to said jury, except to certain individual jurors, who were excused. On the 14th day of February, the said petit jury found the appellant guilty of murder in the first degree, and thereupon his counsel moved the said Court for a new trial, and after full argument and consideration thereof, the motion was denied and the appellant sentenced to be executed on April 5th, 1894.

The application for a writ of habeas corpus was based principally upon two points, viz: 1st—That persons of the African race were excluded in the drawing of the grand and petit juries of the said county, and the appellant thereby denied equal protection under the laws. 2d—that the Court was without jurisdiction.

To the second point answer is made, that the Court had full and complete jurisdiction of the person of the appellant and of the crime charged against him.

"The said Court of Oyer and Terminer shall have cognizance of all crimes and offences whatsoever, which, by law, are or shall be of an indictable or presentable nature, and which have been or shall be committed within the county for which such Court shall be held,"—Revision of New Jersey, Page 272, Sec. 30.

Thus it is seen that the jurisdiction of the trial Court is beyond question, under the law of the State in which this crime was committed.

Relief, therefore, cannot be obtained under the writ of *habeas corpus*.

The appellant does not show that any law of the State of

New Jersey, or any provision of its constitution affecting his rights, is in violation of the constitution of the United States. In fact, the constitution of the State is in harmony with that of the United States; and State laws are framed within the provisions of the State constitution. If a question under the constitution and laws of the United States arose in the case. "The Court that tried him was competent to guard and enforce every right secured to him by that instrument and which might be involved in his trial. The petition for the writ sets forth no ground affecting the jurisdiction, either of the offence charged or of the person alleged to have committed it."—In re. Wood 140 U. S. 2870.

"It is only when the trial court is without jurisdiction of the person or the cause, and a party is subjected to illegal imprisonment in consequence, that the writ of habeas corpus may be invoked."—Ex parte Ulrich, 43 Fed. Rep. 663.

In Ex parte Siebold 100 U. S 375, Justice Bradley said: "The only ground on which this Court, or any Court without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another Court is the want of jurisdiction in such Court over the person or the cause or some other matter rendering its proceedings void."

Assuming that the jurisdiction of the Oyer and Terminer Court is beyond dispute, which must be admitted, then this Court cannot entertain this appeal.

In re Shibuya Jugiro, 140 U. S. p. 297, it is said: "The errors, if any, committed by that Court in respect to any of those matters, did not affect its jurisdiction of the offence or of the person accused, and cannot be reached by *habeas corpus*."

The appellant in the Oyer and Terminer did not question the jurisdiction of the Court over the offence charged or of the person charged, and hence cannot now raise a question as to the trial court's jurisdiction. The record shows that the Court consented to hear a motion to quash the indictment, and that motion it did hear and overrule, as appears on page 8 of the record.

Issue had been joined and application for a rule to take testimony, or to dismiss the indictment, had not been made until the motion was made to quash, and the trial court not

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. —, Original.

EX PARTE: IN THE MATTER OF LAFAYETTE HUDSON, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, AND PETITION FOR WRIT OF MANDAMUS.

Now comes Lafayette Hudson, by his counsel, and moves the Court for leave to file his petition for a writ of mandamus to the Hon. I. C. Parker, judge of the district court of the United States for the western district of Arkansas, commanding him to admit your petitioner to bail, or for a rule against him to show cause why a mandamus shall not issue for that purpose.

LAFAYETTE HUDSON,
By A. H. GARLAND AND
WM. M. CRAVENS,
His Attorneys.

In the Supreme Court U. S., October Term, 1894.

Ex Parte: In the Matter of LAFAYETTE HUDSON, Petitioner.

To the Supreme Court of the United States:

Your petitioner, Lafayette Hudson, respectfully represents that at the May term, 1894, of the district court of the United States for the western district of Arkansas he was convicted of an assault with an intent to kill, and sentenced to imprisonment at hard labor at Brooklyn, in the State of New York, for the term of four years.

On the 14th day of August, 1894, the Hon. David J. Brewer, associate justice of this Court assigned to the circuit in which said district court is held, being absent from said circuit and from Washington city, your petitioner presented to the Hon. E. D. White, associate justice of this Court, at his chambers, in the city of Washington, his petition for a writ of error to this Court to reverse said judgment, and for a supersedeas and bail pending said writ of error, and on his said petition the honorable associate justice endorsed and signed the following order: "Writ of error, to operate as a supersedeas, allowed, returnable according to law, the defendant to furnish bond in the sum of $5,000, conditioned according to law, to be approved by the district judge," all which will appear by reference to the papers on file in this Court on his appeal, No. 820; and after the writ of error had been issued and the citation served upon the United States your petitioner, on September 3, 1894, presented to the Hon. I. C. Parker, judge of said district court, in open court, his bond, which is herewith filed, executed by himself, as principal, and Fagan Bourland, Samuel Peters, Al. Warwick, and James C. Bourland, as sureties, in the sum of $5,000, and said sureties are residents of the western district of Arkansas and are worth in their own right, over and above their debts and liabilities and the property exempt by law from execution, the sum of $17,500, as appears from

their affidavits, then attached to said bond and filed herewith; and upon the presentation of said bond and prayer for its approval by said district judge and discharge of your petitioner, the said judge refused to approve the same or to discharge your petitioner and made the following order, a certified copy of which is herewith filed:

UNITED STATES
vs.
LAFAYETTE HUDSON.

SEPTEMBER 3, 1894.

In the matter of the application of said Hudson for the approval of bond by the judge of this court in the above-entitled cause, pending upon writ of error in the Supreme Court of the United States in obedience to the following order, to wit:

"Writ of error, to operate as a supersedeas, allowed; returnable according to the law, the defendant to furnish bond in the sum of five thousand dollars, conditioned according to law, subject to the approval of the district judge.

"E. D. WHITE,
"*Justice of the Supreme Court of the United States.*

"WASHINGTON, *August* 14, 1894."

It is found by the judge of this court that the above order is made without authority of law, and is therefore invalid, and that the bond approved by him in obedience to it would be null and void, and that there would be no obligation of the sureties to have the principal in court when and where he is required by the terms of the bond to appear, now would there be any obligation resting on the principal to appear, as required by the terms of the bond.

For the above reasons the judge of this court refuses to

approve the bond tendered by the defendant; and, further, it is noted that defendant has made no legal tender of bail.

(Signed) I. C. PARKER,
United States District Judge.

Your petitioner's writ of error has been duly entered and is now pending in this honorable Court, No. —, and petitioner is still confined in prison at Fort Smith, Arkansas, and now he prays that the order of the Honorable Associate Justice White may be affirmed by this Court and the judge of the district court for the western district of Arkansas may be ordered to approve said bond and discharge your petitioner, or that his bond may be approved by this honorable Court and your petitioner discharged, and for all other proper relief.

W. M. CRAVENS AND
A. H. GARLAND,
For Hudson.

Know all men by these presents that we, Lafayette Hudson, as principal, and Fagan Bourland, Samuel Peters, and Al. Warwick and James C. Bourland, as sureties, are held and firmly bound unto the United States of America in the sum of $5,000; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 27th day of August, 1894.

The condition of this obligation is such that whereas the above-bound Lafayette Hudson was, at the May term, 1894, of the United States district court for the western district of Arkansas, convicted of an assault with intent to kill, and was by said court sentenced to imprisonment at hard labor in the penitentiary at Brooklyn, in the State of New York, for the term of four years; and whereas the said Lafayette Hudson hath sued out and obtained a writ of error from

said judgment and sentence to the Supreme Court of the United States, upon which citation hath been issued and served upon the said United States; and whereas the said Lafayette Hudson hath by order of the Hon. E. D. White, associate justice of the Supreme Court of the United States, been admitted to bail, pending said writ of error, in the sum of $5,000:

Now, therefore, if the above-bounden Lafayette Hudson shall prosecute his writ of error to effect and without delay and shall abide by and perform the judgment of the said Supreme Court, and if the said Supreme Court shall reverse the said judgment and sentence of the said district court, then the said above-bound Lafayette Hudson shall be and personally appear in the said district court when lawfully required thereto, and shall continue in said district court from day to day and term to term until he shall be discharged according to law, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

LAFAYETTE HUDSON. [SEAL.]
FAGAN BOURLAND. [SEAL.]
SAMUEL PETERS. [SEAL.]
AL. WARWICK. [SEAL.]
JAMES C. BOURLAND. [SEAL.]

Sealed and delivered in presence of—
STEPHEN WHEELER,
Commissioner Circuit Court,
Western District of Arkansas.

UNITED STATES OF AMERICA,)
Western District of Arkansas.)

I, James C. Bourland, do solemnly swear that I am a resident of the western district of Arkansas, and am worth in my own right, over and above all my debts and liabilities and the property exempt by law from execution, the sum of forty-eight hundred dollars, consisting of the following-described property, to wit:

UNITED STATES OF AMERICA, }
Western District of Arkansas. }

I, Stephen Wheeler, clerk of the district court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, marked X, annexed to this certificate, is a true and complete copy of the order of court in the matter of bail in the case of Lafayette Hudson, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 7th day of September, A. D. 1894.

S. WHEELER, *Clerk*,
By I. M. DODGE, *D. C.* [SEAL.]

1 The United States of America. In the Supreme Court at the October term, A. D. 1894.

Ex parte Lafayette Hudson.

The answer of I. C. Parker, judge of the district court of the western district of Arkansas, to the rule upon him to show cause why a peremptory writ of mandamus should not issue commanding him to approve the bail bond of said Lafayette Hudson, which said rule is hereto attached.

INTRODUCTION.

The respondent fully and entirely appreciates the delicacy of his position in this case, and with the very highest regard for the honor, integrity, ability, and lofty character of this honorable court, he begs permission to state that from his sense of duty to the position he holds, as well as to the law of the country and his obligation to aid in its enforcement for the safety of the people and the protection of their rights, he deems it absolutely necessary that he should make a full response to the rule in this case. He begs leave to state, however, that in doing so he is fully aware that the main questions involved have never been passed upon by this honorable court and that the action that has been taken in this case was unquestionably taken by the Honorable Mr. Justice White in good faith, but that the same was passed upon after an ex parte presentation, and such action was undoubtedly taken under such circumstances as that Mr.
2 Justice White did not have an opportunity of giving the subject due deliberation.

STATEMENT OF CASE.

Your respondent respectfully answers and certifies to the honorable Supreme Court of the United States that the petitioner, at the May term, A. D. 1894, of the district court for the western district of Arkansas, was convicted by a verdict of the jury of an assault with intent to kill; that he was subsequently, at said term, sentenced to imprisonment at hard labor in the penitentiary of Kings County, New York, for a term of four years. He filed his motion for a new trial, which was overruled. He then tendered his bill of exceptions, which was signed by respondent. He then filed with the clerk his assignment of errors. Upon Monday, August 6th, A. D. 1894, the judge of the court made the following order:

"Ordered, that upon the filing of an assignment of errors in the above-entitled cause the clerk of this court shall issue a writ of error taking this case to the Supreme Court of the United States in order that any alleged errors may be corrected if found to exist by said Supreme Court."

At the request of counsel for defendant the writ of error was not immediately issued by the clerk, because said counsel stated that they had not determined whether they would take the case to the Supreme Court. Notwithstanding this, before the clerk had issued the writ, the defendant, by petition, applied to Mr. Justice White, one of the associate justices
3 of the Supreme Court of the United States, for a writ of error and supersedeas, and for bail pending the case on writ of error in the

Supreme Court. On the petition filed for defendant by his counsel, Mr. Justice White, on August 14th, A. D. 1894, made this order:

"Writ of error to operate as supersedeas allowed, returnable according to law, the defendant to furnish bond in the sum of five thousand dollars, conditioned according to law, subject to the approval of the district judge.

"WASHINGTON, *August 14th*, 1894.

(Signed) "E. D. WHITE,

"*Associate Justice Supreme Court, United States.*"

That these facts will appear by reference to the record of Hudson v. United States, now on file in this honorable court.

That subsequent thereto petitioner with others was tried and convicted of conspiracy to run away the principal witness against him in the above entitled cause; that one of the conspirators gave evidence against him, and that he is now in jail at Ft. Smith, Arkansas, on that charge.

WRIT CAN NOT BE ISSUED IF OTHER REMEDY EXISTS.

The respondent respectfully submits that the writ of mandamus is an extraordinary remedy. The right to it rests upon the fact that there is no remedy provided for the wrong, but in justice and good government there ought to be a remedy, or because there is no other adequate remedy. (Merrill on Mandamus, sec. 10).

4 It is submitted if par. 2 of rule 36 of this honorable court is authorized by law, then petitioner has a clear, adequate, easy, and complete remedy, for all he has to do is to apply to Mr. Justice Brewer for the approval of his bail bond. If the above paragraph of rule 36 is unauthorized, then petitioner has no right for which he can seek a remedy, and this writ should not issue.

WRIT CAN NOT BE ISSUED TO CONTROL THE EXERCISE OF A JUDICIAL DISCRETION.

The respondent respectfully further submits, that by the terms of par. 2 of Rule 36 of this honorable court, which is as follows:

"Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under sections five and six, the circuit court or district court, or any justice or judge thereof, shall have power after the citation is served to admit the accused to bail in such amount as may be fixed."

The power of admitting to bail after conviction and sentence by the judicial officers therein named is a judicial power that is purely discretionary; that it is a matter upon which the officers named as having authority to admit to bail after conviction and sentence are to exercise judicial discretion; that the language of the rule implies this, and nothing less. It is manifestly true that the approval of the bond of petitioner is an act that is judicial in its nature, because in the approval of bonds questions of law are required to be decided, and matters of fact are also to be ascertained. This condition makes the act judicial in its nature, and not purely ministerial. (Secs. 186–187, Merrill on Mandamus.)

5 That every step taken in the matter of admitting to bail, from the declaration that the party shall be so admitted, including the fixing of the amount of the bond and the approval of the same, is an exercise of judicial power, requiring the decision of questions of law and the ascertainment of matters of fact, and the use, it may be, of the highest discretion and judgment, and each one of these steps is necessary to be taken to complete the work of admitting to bail, and each one of said steps, under the rule of this honorable court, is purely discretionary. That the fact that Mr. Justice White may have ordered the respondent to approve the bond does not make the act on the part of respondent any the less a discretionary act, for the discretionary character of the duty of respondent in the matter of admitting to bail does not become any less discretionary because of the order of Mr. Justice White, for he could not by his order make a discretionary power or duty a mandatory one. That it is not consistent with the objects and usages of law that the honorable, the Supreme Court, by such a summary mode and extraordinary remedy as that of mandamus, will revise the discretionary judicial action of this inferior court about the matter of approving a bail bond.

Your respondent submits that the writ of mandamus has never been extended by this honorable court so far, nor never used by it to control the discretion and judgment of an inferior court of record, acting within the scope of its judicial authority. (Ex parte Railway Co., 101 U. S., 711, and the numerous authorities there cited.)

This honorable court will not interfere by mandamus with the discretion of respondent in approving the bond of petitioner. (Ex parte The Milwaukee R. R. Co., 5 Wall., 188; Ex parte Daniel Taylor, 14 How., 2.)

6 Especially when the act of respondent is expressly made a discretionary power or duty by a rule of this court. The matter complained of here being one purely of judicial discretion, made so by the thirty-sixth rule of this honorable court, the act, therefore, complained of rests in the exercise of this discretion, and by the law of the American cases the writ must be denied, because the question involved is one purely of judicial discretion. (Ex parte Bradley, 7 Wall., 364.)

Your respondent submits that upon this further ground alone the preliminary writ of mandamus must be refused.

UNDER RULE 36 PARTY CAN NOT BE ADMITTED TO BAIL UNTIL CITATION SERVED.

Your respondent further states that by the second paragraph of rule 36 of this honorable court, as set out above, a party after conviction and sentence of a crime, such as that of which this petitioner has been convicted, could only be admitted to bail after citation is served. By the terms of that rule, when that step has been taken, the courts and judges named in the rule "shall have power to admit the accused to bail." Until that is done, by rule 36, no step looking towards admitting to bail can be taken. As shown by the record in Hudson v. U. S., now pending in this honorable court on writ of error, when this order was made by Mr. Justice White admitting petitioner to bail on the 14th day of August, A. D. 1894, there had been no citation served. The record shows that no service

thereof was had until August 21st, A. D. 1894—seven days after
7 the order was made. The respondent respectfully submits that no order admitting to bail could be made until after citation is served. If such could be the case the party could escape imprisonment before he had his case in the appellate court, or before he had taken the necessary steps to bring it there.

For this additional reason the remedy invoked in this case should fail.

Mr. Justice White could not, under rule 36, make an order admitting Hudson to bail, for he was not a circuit judge or circuit justice of the eighth circuit, the one in which Hudson was tried; nor is he the district judge of any district in the circuit.

Your respondent further states that the order admitting the petitioner to bail is void, for the reason that Mr. Justice White had no authority by the terms of par. 2, rule 36, to make such order; for, when the said rule provides that "the circuit court or district court, or any justice or judge thereof, shall have power to admit to bail," it clearly means the circuit court of the circuit where the trial is had, or any justice or judge thereof. It is respectfully submitted that the honorable Mr. Justice White was not a justice of the Supreme Court for the eighth circuit, the one in which petitioner was tried; nor is he a judge thereof. Neither is he a district judge of the district court which tried the case. Sec. 606, R. S. U. S., provides for the allotment of the Chief Justice and Associate Justices of the Supreme Court among the respective circuits of the United States.
8 Sec. 605 provides that "circuit justice or justice of the circuit, when used in this title, shall be understood to designate the Justice of the Supreme Court who is allotted to any circuit." On the second of April, A. D. 1894, the last allotment was made by an order of this honorable court. (Vol. 152, Supreme Court Reports.)

His honor, Mr. Justice White, was allotted to the fifth circuit. That makes him a justice of the circuit court of the fifth circuit only. His honor, Mr. Justice Brewer, was allotted to the eighth circuit. He is the only justice of the circuit court of this circuit. Hence, Mr. Justice White is not one of the judicial officers mentioned in the second paragraph of rule 36, when we apply the designation of such officer to this court, and he is consequently without authority by the terms of rule 36 to make the order admitting petitioner to bail.

The respondent submits that the bond he is ordered to approve in this case, under the circumstances set out above, would be null and void, and to be binding upon the principal and sureties it must be valid. To give such bonds such validity as to secure the appearance of a party charged with crime, they must be taken and executed in pursuance of the order of the proper court or officer. Your respondent submits that he ought not to be compelled by mandamus to approve a bond that is invalid, because ordered taken without authority to make such order, when by rule 36 of this honorable court, in the interest of public security, a judge of a district court is given a power that can not, in the matter of admitting to bail after conviction and sentence be treated otherwise than as being discretionary.

For this additional reason your respondent submits that the
9 peremptory writ of mandamus can not be invoked.

THE HONORABLE, THE SUPREME COURT, DOES NOT HAVE THE POWER TO PRESCRIBE PAR. 2 OF RULE 36.

Your respondent recognizes fully that this court is governed by that rule of duty which prompts it to form opinions, and also to reconsider, revise, and modify its own already declared judgments and orders, and, with the greatest deference to and the highest respect for it and its opinions, he most earnestly submits that Congress has made no law providing for the admission to bail after conviction and sentence, and while the case is pending on writ of error, of persons convicted of crimes like the one for which the petitioner Hudson has been convicted. There is no Federal statute on the subject of admitting to bail after conviction and sentence in cases like this. The right to bail is a great right, but great as it is, it is only to be secured by an enactment of the law-making power. Therefore, this honorable court has not been given power to prescribe par. 2 of rule 36, by any direct or express act of Congress on the subject of bail after conviction and sentence; that this honorable court does not possess such power by the common law, as by its rules no bail was allowed after conviction and sentence; nor does it possess it by authority of any statute of the United States giving it the right to make and establish all necessary rules for the orderly conduct of business in the court, or to prescribe the mode and form of proceeding so as to obtain the object for which jurisdiction was given in all cases where Congress has not legislated. That admitting to bail is not necessary to secure the orderly conduct of
10 business. The business of the court may be conducted in perfect order, whether a party whose case is in the court by writ of error is admitted to bail, or is in prison pending the hearing of his case. The object for which jurisdiction was given may be fully obtained whether the party is on bond or in prison. That the constitutional guaranty of bail does not operate after conviction and sentence; that while it may be given after such conviction and sentence, it can not exist except by virtue of legislative enactment. That none of the statutes of the United States now in force in relation to bail can possibly be construed to apply to a case of bail after conviction and sentence of a crime such as that of which petitioner was convicted and sentenced. Whenever the right to bail after conviction and sentence is found to exist it has been given by statute, and it has never been exercised after conviction and sentence without a statute declaring that it might be given, and by these statutes it is always left discretionary with the trial judge. This is so universal that it may be said to be the American policy.

The respondent submits that this honorable court has not been given by any implied or express language of any statute on the subject the power to provide by rule for admission to bail in any case after conviction and sentence like that of petitioner, and while the same is pending on writ of error. Secs. 1014, 1015, and 1016 of the R. S. U. S., clearly have reference to bail for parties under arrest, before trial and conviction. sec. 1014 provides who may arrest; sec. 1015 provides what kind of cases shall be bailable, and sec. 1016 provides what kind of cases may be bailable, but both of the last-named sections have reference to the
11 state of case named in section 1014—that is, cases before conviction. This is the legislative interpretation of the law as shown by

sec. 1017, having reference to bail in criminal cases removed from State courts, for if the first-named sections have reference to bail after conviction and sentence, then section 1017 is a useless enactment, for the power to admit to bail in cases provided for by it would exist without it. The adoption of par. 2, rule 36, by this honorable court is a judicial interpretation of sections 1014, 1015, and 1016, for if the right to bail after conviction and sentence existed under these sections, then par. 2 of rule 36 becomes superfluous. But it is submitted that sections 1014, 1015, and 1016 need no judicial or legislative construction, as their meaning and purpose is so plain that there is no room for such construction. It is submitted that the right to say when, and in what cases, bail may be taken must be regulated by the law-making power of the Government; that the giving and taking of bail is now limited, regulated, and controlled by statute. The law-making power of the United States, it seems to your respondent, has regarded it as necessary to declare when bail may be taken, as in every case that is generally recognized as bailable Congress has made provision by legislation for such bail. It happens not to have made any provision for bail in cases like that of petitioner. Even in cases where a party is in custody upon an appeal and proceedings by habeas corpus, Congress has made provision for the keeping of the petitioner, as shown by section 763 R. S. U. S.

It is submitted that it is not a question of what ought to be, but
12 a question of what is, under the law, for this is a government of laws, and not of men.

The respondent respectfully submits that the last-named position is another conclusive reason why mandamus should not issue. He desires further to state that he has no pride of opinion to satisfy; that to afford security from crime to those who so often, in his jurisdiction, become its innocent victims is his only motive; that if bonds are to be taken that are invalid while the cases of men who have been convicted of high crimes are pending in this court, it may be for years, respondent submits that all law is in a measure paralysed, and all protection to the innocent citizen in a large degree destroyed.

Your respondent, having, as he considers, fully answered the rule, requests an earnest, careful, and full consideration of this, to the public, important matter. He respectfully submits the questions involved to the judgment of this honorable court, and will, as a matter of course, enforce by order any decision given by the court in the premises.

Your respondent respectfully refers to the brief filed by counsel in this case, and the authorities therein referred to, in support and maintainance of the position asserted by his answer.

He therefore respectfully prays to be dismissed without day.

I. C. PARKER.

13 Supreme Court of the United States. No. Original, October Term, 1894.

Ex parte, in the matter of Lafayette Hudson, petitioner.

On consideration of the petition of Lafayette Hudson, it is now here ordered by the court that cause be shown by the Honorable I. C. Parker, judge of the district court of the United States for the western district

of Arkansas, before this court, at Washington, on the first Monday of January, 1895, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of mandamus should not be granted as prayed in said petition.

December 3, 1894.

14 *Supreme Court of the United States.*

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing are true copies of the petition for a writ of mandamus and rule to show cause granted thereon in the case entitled Ex parte, in the matter of Lafayette Hudson, petitioner, No. 9, original, October term, 1894, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this fifth day of December, A. D. 1894.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Indorsed on back:) Supreme Court of the United States. October term, A. D. 1894. No. 9, original. Ex parte: In the matter of Lafayette Hudson, petitioner. Response to rule to show cause why peremptory writ of mandamus should not issue.

(Indorsed on cover:) Supreme Court U. S. October term, 1894. Term No., 9, original. Ex parte, In the matter of Lafayett Hudson, petitioner. Return to rule. Filed December 21, 1894.

O

Office Supreme Court, U. S.
FILED.
JAN 3 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

ORIGINAL No. 9.

EX PARTE: LAFAYETTE HUDSON. ON PETITION FOR MANDAMUS.

THE RESPONDENT'S BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

ORIGINAL NO. 9.

EX PARTE: LAFAYETTE HUDSON. ON PETITION FOR MANDAMUS.

THE RESPONDENT'S BRIEF.

STATEMENT OF CASE.

The petitioner in this case at the May term, A. D. 1894, of the district court for the western district of Arkansas, was convicted by verdict of a jury of an assault with intent to kill. He was subsequently, at said term, sentenced to imprisonment at hard labor in the penitentiary of Kings County, N. Y., for a term of four years. He filed his motion for a new trial, which was overruled. He then tendered his bill of exceptions, which was signed by respondent. He then filed with the clerk his assignment of errors. Upon Monday, August 6, A, D. 1894, the judge of the court made the following order:

> *Ordered*, That upon the filing of an assignment of errors in the above-entitled case, the clerk of this

court shall issue a writ of error taking this case to the Supreme Court of the United States in order that any alleged errors may be corrected, if found to exist by said Supreme Court.

At the request of counsel for defendant, the writ of error was not immediately issued by the clerk, because said counsel stated that they had not yet determined whether they would take the case to the Supreme Court. Notwithstanding this, before the clerk had issued the writ, defendant, by petition, applied to Mr. Justice White, one of the associate justices of the Supreme Court of the United States, for a writ of error and supersedeas, and for bail pending the decision of the case on writ of error in the Supreme Court. On the petition filed for petitioner by his counsel, Mr. Justice White, on August 14, A. D. 1894, made this order:

> Writ of error to operate as supersedeas allowed, returnable according to law, the defendant to furnish bond in the sum of five thousand dollars, conditioned according to law, subject to the approval of the district judge.
>
> Washington, August 14, 1894.
>
> (Signed) E. D. WHITE,
> *Associate Justice, Supreme Court, United States.*

These facts will all appear by reference to the record of *Hudson* v. *United States*, now on file in this court. Subsequently thereto petitioner, with others, was tried and convicted of conspiracy to run away the principal witness against him in the above-entitled case. One of the conspirators gave evidence against him, and he is now in jail at Fort Smith, Ark., on that charge, as well as on the charge upon which he has already been sentenced. Peti-

tioner subsequently filed his petition in this honorable court for leave to file petition for a writ of mandamus, upon which petition this court made the order attached to the response of respondent, requiring respondent to appear and show cause why a peremptory writ of mandamus should not issue to compel him to approve the bond of Hudson.

ARGUMENT.

PETITIONER IN THIS CASE MUST SHOW A CLEAR AND UNQUESTIONED RIGHT TO THIS REMEDY.

High on Extraordinary Legal Remedies, sections 197, 198, says:

> No principle of the law of mandamus is better established than that requiring the party aggrieved to show, as the foundation of the proceedings, that the specific act sought to be coerced is the duty of the person against whom the writ is directed, and the rule applies with equal force to cases where the relief is sought against courts and judges. And where it is apparent that the thing sought to be performed is not a duty resulting from the office of the judge, relief will be withheld. * * *
>
> It is also a fundamental rule that the relator must show a clear and unquestioned right to the specific thing sought, and this rule is applied in all cases where the purpose of the proceeding is to compel the action of judicial tribunals. * * *

WRIT CAN NOT ISSUE IF OTHER REMEDY EXISTS.

The respondent respectfully submits that the writ of mandamus is an extraordinary remedy. The right to it

rests upon the fact that there is no remedy for the wrong, but in justice and good government there ought to be a remedy, or because there is no other adequate remedy.

Merrill on Mandamus, section 10, says:

> The reasons given for its issuance are, that there is no remedy provided by law for the wrong, but in justice and good government there ought to be a remedy.
>
> Further it will issue because "there is no adequate remedy."

At section 177, High on Extraordinary Legal Remedies, it is declared:

> Another rule underlying the entire jurisdiction by mandamus over inferior courts, and second only in importance to that just considered, is, that the existence of another adequate legal remedy is always a bar to relief by mandamus to control the action of such courts. And in all cases where full and ample relief can be had, either by appeal, writ of error, or otherwise, from the judgment, decree, or order of the subordinate court, mandamus will not lie, since the courts will not permit the functions of an appeal, or writ of error, to be usurped by the writ of mandamus. Indeed, the interference in such cases would, if tolerated, speedily absorb the entire time of the appellate tribunals in revising and superintending the proceedings of inferior courts, and the embarrassment and delay of litigation would soon become insupportable, were the jurisdiction by mandamus sustained in cases properly falling within the appellate powers of the higher courts. It may, therefore, be laid down as the universal rule, prevailing both in England and America, that the existence of another remedy adequate to correct the action of the inferior court will prevent relief by mandamus.

At section 12 of Merrill on Mandamus it is said:

> It is considered to be a harsh remedy, and to be substituted for the ordinary process only in extraordinary proceedings, and laws extending its operation should be strictly construed.

This honorable court said by Mr. Justice McLean, in *United States ex rel. Crawford*, v. *Addison*, 22 How., 183—

> A mandamus is a remedy where there is no other appropriate relief, and is only resorted to on extraordinary occasions.

If paragraph 2 of rule 36 is authorized by law, then petitioner has a clear, adequate, easy, and complete remedy by applying to Mr. Justice Brewer to approve his bond. If paragraph 2 of rule 36 is not authorized by law, then petitioner has no right for which he can invoke this extraordinary remedy. It is therefore submitted the writ can not isssue for the above reasons.

WRIT CAN NOT ISSUE TO CONTROL JUDICIAL DISCRETION.

Upon the theory that paragraph 2 of rule 36 is valid, by the language of the same—that is, that the judges *shall have power to bail*, admitting to bail after conviction and sentence is clearly a matter of judicial discretion, for, first, it is a matter that is judicial in its nature; it is not like the approval of mere official bonds, which may be compelled by mandamus upon the ground that the approval by a court, when the amount and the form of a

bond is prescribed by law, is simply a ministerial act, while in the approval of bail bonds the judge or court is required to decide questions of law and ascertain matters of fact. This makes it a judicial action; but whether it is judicial or ministerial in character, the very terms in paragraph 2 of rule 36 make the duty a discretionary one, for it says, not that the judges or courts *shall approve* the bond, but that *they shall have power* to approve it.

Section 187, Merrill on Mandamus, declares:

> As to all cases which are judicial in their nature where the party or tribunal at whose hands performance is sought is required to decide questions of law, or to ascertain matters of fact, the writ of mandamus will not issue. Nor will it issue to correct the errors of the court in the exercise of its judicial discretion, nor to control the exercise of its discretion.

High, on Extraordinary Legal Remedies, at section 156, declares:

> The fundamental principle underlying the entire jurisdiction by mandamus over the action of inferior courts is, that in all matters resting within the discretion of the inferior tribunal, mandamus will not lie to control or interfere with the exercise of such discretion. And while the jurisdiction of superior common-law courts over courts of inferior powers, by the writ of mandamus, is well established, it is exercised with the utmost caution, lest there should be any improper interference with the exercise of the judicial powers of the court below, and it will only be used in such manner as to leave the inferior tribunal untrammeled in the exercise of the disretionary or judicial powers with which it is properly

vested by law. And the rule may be regarded as established by an overwhelming current of authority, both English and American, that mandamus will not lie to control the exercise of the discretion of inferior courts, and where such courts have acted judicially upon a matter properly presented to them, their decision can not be altered or controlled by mandamus from a superior tribunal. And it is important to observe that the rule applies with equal force, regardless of the propriety or impropriety of the action of the inferior court. It is sufficient that the discretion has been exercised, and whether rightly or wrongfully exercised can not be questioned by mandamus.

MANDAMUS DOES NOT LIE TO CORRECT ALLEGED ERRORS BY INFERIOR COURTS IN THE EXERCISE OF JUDICIAL DISCRETION.

The case of *Ex parte Railway Company* (101 U. S., 701, 720) is conclusive on this proposition, for in it this honorable court says:

> We recognize in its fullest extent the power of this court by mandamus to enforce prompt compliance with its mandates; but it is not consistent with the principles and usages of law that we should, in that summary mode, revise the action of inferior courts as to matters about which they must *or may exercise* judicial discretion.
>
> *Hollon Parker, petitioner,* 131 U. S., 221.
>
> *Ex parte Morgan,* 114 U. S., 174.
>
> *Chateaugay Ore and Iron Co., petitioner,* 128 U. S., 544.
>
> *Ex parte Flippin,* 94 U. S., 348.

The writ has never been extended so far, nor ever used to control the judgment and discretion of an inferior court of record, acting within the scope of its judicial authority.

Ex parte Railway Co., 101 U. S., 701.
Ex parte Taylor, 14 How., 3.
Ex parte Many, 14 How., 24.
United States v. *Lawrence*, 3 Dall., 42.
Insurance Co. v. *Wilson's Heirs*, 8 Peters, 291.
Ex parte Hoyt, 13 Peters, 279.
Ex parte Whitney, 13 Peters, 404.
Ex parte Newman, 14 Wall., 152.

This honorable court will not interfere by mandamus with the discretion of respondent in approving bail bond of petitioner, especially when the court has made by its own rules the duty of approving the bail bond a discretionary duty. (*Ex parte Milwaukee Railway Co.*, 5 Wall., 188.)

This case is strictly in point, as it decides that mandamus will not issue to control discretion of judge in approving a bond. (*Ex parte Taylor*, 14 How., 3.)

The very language of paragraph 2 of rule 36 makes it a matter of discretion. It does not make it mandatory. It simply grants the power to bail. This discretion is one to be exercised by any of the judges named in the rule, and the order of one having in the matter coordinate jurisdiction with another, can not convert a discretionary power in that other to a mandatory duty. Therefore, we take it that the order of Mr. Justice White still left the power in respondent a discretionary one. In fact, his very language made the approval of the bond by respondent a discretionary duty. He said in his order, "*the bond was subject to the approval of the district judge.*" This clearly

made the act a discretionary one, as "subject to" means "placed under the authority of," or "placed under the power of," or "subject to the action of." In this case it means such action as the district judge in his discretion might determine to take with regard to the approval of the bond.

We submit, because the power to bail is only a discretionary one, its execution can not be commanded or enforced by mandamus. Respondent can not be compelled to approve an invalid bond.

MANDAMUS CAN NOT BE USED TO COMPEL AN INFERIOR COURT OR JUDGE TO APPROVE AN INVALID BOND.

The inferior court, or judge, must, in the interest of justice, be left, as they are left, by paragraph 2 of rule 36, the discretionary right to pass upon the validity of bonds. It may be asked, would the bond be valid in this case if taken in obedience to Mr. Justice White's order admitting petitioner to bail? The material question that the district judge must determine is, whether the bond taken as ordered by Mr. Justice White would be valid. To be effective and binding on the principal and sureties it must be valid Then, again, has the judge of the district court, under the circumstances of this case, anything to do with the validity of this bond to be approved by him as ordered? Should he approve it if invalid? Does his duty call on him to see to its validity? Most certainly, because one of the highest duties in order to secure an effective administration of justice is to allow bail and pass upon its sufficiency in cases where authorized by law.

We inquire, What is necessary to make a bail bond valid? First, it must be taken by competent legal author-

ity; second, it must be in correct legal form; third, to make it a good bail bond the sureties on it must be sufficient. All of these propositions enter into the validity and sufficiency of the bond.

Mr. Justice White allowed the defendant bail as provided by his order above referred to. He admitted the party to bail and ordered that the bail bond was subject to the approval of the judge of the district court. Could he admit to bail? Could he declare that the defendant should be bailed?

On May 11, 1891, the Supreme Court of the United States promulgated the following as a second paragraph of rule 36, to wit:

> Where such writ of error is allowed in case of conviction of infamous crime, or in any other criminal case in which it will lie under sections 5 and 6, the circuit court, or district court, or any justice or judge thereof, *shall have power, after the citation is served*, to admit the accused to bail in such amount as may be fixed.

Section 5 of the act establishing a circuit court of appeals, approved March 3, 1891 (26 U. S. Stats., 827), gives the right of appeal or writ of error on conviction of capital or otherwise infamous crimes. Its language in defining the jurisdiction of the Supreme Court of the United States in cases of appeals and writs of errors is as follows:

> In cases of conviction of capital or otherwise infamous crimes—

meaning appeal or writ of error will lie for that kind of cases. The only authority for bail in cases of writs of

error to be had after conviction and sentence of infamous offenses, as we contend, is the second paragraph of rule 36. That rule of this honorable court limits the courts and judges who are to admit to bail. There are two words of limitation, the word "the" and the word "thereof." "The" is a word used before nouns in a specifying or particularizing effect, opposed to the indefinite or generalizing force of "a" or "an." The word "thereof" means "of that, of it." This word "thereof" limits the word "justice or judge" to a justice or judge of the courts above specified—that is, manifestly the circuit or district court of the circuit where the case was tried. This rule is capable of the construction that this honorable court intended to say that the party should be admitted to bail by the court which tried the case; if it was tried by a circuit court, then the party might be admitted to bail by such court, or by any judge or justice thereof. If he was tried by district court, he might be admitted to bail by the judge who tried him in such court. This is manifestly the interpretation placed upon the rule by Judge Benedict in case of *United States* v. *Simmons*, 47 Fed. Rep., 724.

In his opinion, the learned judge says:

> The rules of the Supreme Court of the United States permit persons convicted, when they appeal to the Supreme Court of the United States, to be admitted to bail, but leave the question of admitting to bail to the discretion of the court below.

The court below means the court which tried the case. We submit this as a construction in the interest of justice. Such court knows the character of the case, knows the character of the defendant (and this may be taken into

account on a question of bail), and the qualifications of the sureties offered; and as the rule of this court is clearly discretionary, the court which tried the accused, if justice is to be administered and the law enforced, is the only court capable of exercising a sound discretion on the subject, because of the want of knowledge of facts that should be considered on the part of courts which had nothing to do with trying the case. But suppose that we take the other construction of this rule and say that it means that the bail might be taken by the circuit court of the circuit where the trial for the crime was had, or the district court which tried the case, or by any justice or judge thereof. While the more reasonable construction is that this honorable court meant that it should be taken only by the court which tried the case, still if it was intended to give the circuit court of the circuit where the case was tried, or any justice or judge thereof, the power to bail, it was not intended to give any circuit judge, or justice of a circuit court, such power. But, upon either construction, let us see if Mr. Justice White comes within the description of any of the courts or judges named in this rule.

The rule, when it speaks of a justice thereof, evidently must mean a justice of the circuit court, for, as has been said, the word "thereof" means "of that court" or "of that circuit court" in which the case was tried. There is no such officer as a justice of the district court. Who is the justice of the circuit court of this circuit? Section 605, Revised Statutes of the United States, provides as follows:

> The words "circuit justice" and "justice of the circuit," when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justices.

Section 606 of the Revised Statutes provides:

> The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of alteration of any circuit, or the new appointment of a Chief Justice or associate justice or otherwise. If a new allotment becomes necessary within any other time than during the term it shall be made by the Chief Justice and shall be binding until the next term and until new allotment by the court.

It will be seen that section 605 provides that "circuit justice, and justices of a circuit, when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit." The last-named section provides for the method of allotment. Then, under the law, it is the allotment that makes them justices of the circuit courts. On the 2d of April, 1894, the last allotment was made by an order of the Supreme Court. This order is to be found in Vol. 152, Supreme Court Reports. Associate Justice White was allotted to the fifth circuit. That makes him a justice of the circuit court of the fifth circuit. Mr. Justice Brewer was allotted to the eighth circuit. He is the only justice of the circuit court of this circuit. Hence, Mr. Justice White is not one of

the judicial officers mentioned in the second paragraph of rule 36 when you apply the designation of such officer to the circuit court for the eighth circuit, and he is consequently without authority to make the order to admit to bail in this circuit.

It may be asserted that, this case being in the Supreme Court, and Mr. Justice White being an associate justice of such court, he could admit to bail. When the order to admit the defendant to bail was made in this case on the 14th day of August, 1891, no citation had been served. The acknowledgment of service of said citation was made by the district attorney of the district on the 21st of August, 1894, seven days after the making of the order by Mr. Justice White. Then there was no service of citation at the time of the making of the order. Hence, the case could not be in the Supreme Court when the order was made. But if it was in the Supreme Court, such court has said by its rule who shall bail in cases like this, and it has not said an associate justice, as such, of the Supreme Court shall admit to bail, but he must be a judicial officer known to the law as a justice of a circuit court, and this character can come alone by allotment. If the justice of any circuit court, whether in the circuit or not, can make an order admitting to bail, then under the language of this rule any circuit judge, or district judge, can admit to bail, no matter whether of the circuit or district where the case was tried or not. The district judge or circuit judge of the district of Oregon, under such construction, could admit a man to bail who was tried and convicted in the district of South Carolina. We submit this never was intended.

MR. JUSTICE WHITE COULD NOT ADMIT TO BAIL UNTIL CITATION SERVED UNDER PARAGRAPH 2 OF RULE 36.

By the rule of this honorable court it seems that the proposition is clear that Mr. Justice White had no right to make the order for bail. No one could make it, under the rule of the Supreme Court, until "after citation is served." The record in the case of Hudson shows it had not been served when the order for bail was made, and was not served until seven days afterwards. We submit this alone would make the order invalid.

Again, the power to admit to bail by the circuit judge, the circuit justice, or the district judge, is with all such officers a discretionary power, for the language of the rule is not *that they shall or must admit to bail*, but *that they shall have the power to admit to bail*. This undertakes to give them the power to do it, of course taking into consideration a wise administration of justice, leaving to their sound discretion the question of admitting to bail. It will be observed under the language of this rule that under certain circumstances their power, while being discretionary, is equal. It may be asked where the powers are the same in three different judges, and these powers are discretionary in all, can one of these three judges make an absolute order on any one of the others to perform a discretionary judicial function or duty? Even if the order of Mr. Justice White could be considered as a peremptory one, then we submit he could not make it on the district judge by the terms of rule 36.

On the grounds above-named it seems to us the order of Mr. Justice White must be without authority of law.

SHOULD THE BOND BE TAKEN UNDER SUCH ORDER?

But it may be said, Why not take the bail under the order of Mr. Justice White, although such order may be without authority of law? And the question may be further put, whether or not a bond taken under such circumstances would not be good anyhow? We think not. We submit the authorities are uniform on that subject.

> Bonds to secure the appearance of a person charged with crime must be taken and executed in performance of the proper court or officer. (*United States* v. *Goldsteine's Sureties*, 1 Dill., 413.)

In *United States* v. *Horton's Sureties* (2 Dill., 94), Judge Dillon says:

> It is settled that bonds are valid only when taken in pursuance of law and the order of a competent court.

It is said by the court in the case of *State* v. *Buffum* (2 Foster, N. H., 267), in speaking of the liabilities of sureties on bail bond: "They are liable, in any case, only upon the ground that they have entered into a recognizance ordered by a tribunal having authority to act in the premises."

> It is of the essence of all contracts or undertakings by a surety or bail that there should have been a valid obligation of the principal. (*United States* v. *Hand*, 6 McLean, 274, 276.)
>
> Bail taken by a court without jurisdiction, or by an officer without authority, is void:
>
> *State* v. *Winninger*, 81 Ind., 51.
> *Dickson* v. *State*, 29 N. W. Rep., 184.
> *State* v. *Jones*, 3 La. Ann., 9.
> *Gray* v. *State*, 43 Ala., 41.

Jacquemine v. *State*, 48 Miss., 280.
Branham v. *Commonwealth*, 2 Bush. (Ky.), 3.
Commonwealth v. *Roberts*, 1 Duv., 199.
Commonwealth v. *Fisher*, 2 Duv., 376.
Dugan v. *Commonwealth*, 6 Bush., 305.
Harris v. *Simpson*, 4 Littell, 165.
State v. *McCoy*, 57 Tenn., 111.
Wallenweber v. *Commonwealth*, 3 Bush., 68.
Williams v. *Shelby*, 2 Oregon, 144.
Schneider v. *Commonwealth*, 3 Met. (Ky.), 409.
Blevins v. *State*, 31 Ark., 53.
Cooper v. *State*, 23 Ark., 278.
State v. *Nelson*, 28 Mo., 13.
State v. *Hays*, 4 La. Ann., 59.
State v. *Vion*, 12 La. Ann., 688.
Holmes v. *State*, 44 Tex., 631.
State v. *Berry*, 8 Me., 179.
Commonwealth v. *Loveridge*, 11 Mass., 337.
Commonwealth v. *Otis*, 16 Mass., 198.
Commonwealth v. *Canada*, 13 Pick., 86.
Powell v. *State*, 15 Ohio, 579.
State v. *Clark*, 15 Ohio, 595.
People v. *McKinney*, 9 Mich., 444.

The above authorities show two propositions: First, what is necessary to make a valid bail bond—that is, it must be taken and executed in pursuance of the order of a proper court or officer; that bonds are valid only when taken in pursuance of law and the order of a competent court or judge. And, second, that bonds unless valid are not binding upon the principal or sureties. Should respondent be compelled by mandamus to approve a bond of this character? We submit that if this bond is approved it is one that is necessarily invalid for the reasons given, and for others that follow in this brief.

It may be said that bail should be taken under the circumstances of this case, in the interest of liberty. We submit that if it is unauthorized by law it is not in the interest of liberty, but of licentiousness; that such an act would not be in the interest of the enforcement of the law, but would be against its faithful administration and the protection of each and every citizen in the rights of life, liberty, and property. If the order for bond in this case is not authorized by law, can validity be imparted to it? It may be suggested that if bail bonds are void, large numbers of persons can give such bonds and go scot-free, and thus justice is defeated.

WHO IS RESPONSIBLE FOR TAKING VALID BAIL BONDS?

The responsibility of taking valid bail bonds, in the interest of justice, should always rest in the discretion of the trial court, and such court should be held to a strict account in taking valid bail bonds.

CAN A PARTY CONVICTED OF SUCH A CRIME AS THAT OF PETITIONER BE ADMITTED TO BAIL AFTER CONVICTION AND SENTENCE, AND PENDING WRIT OF ERROR, UNDER THE LAW AS IT NOW STANDS?

Is there any power in anyone, under the laws of the United States, to admit such persons to bail? In cases where bail has been allowed after conviction and sentence, pending an appeal or writ of error, the same has been allowed in pursuance of statutes on the subject, or where a constitutional provision was broad enough under such circumstances to authorize bail. But we submit there is

no provision of the Federal Constitution comprehensive enough to allow bail after conviction and sentence in a case like petitioner's; nor is there any Federal statute on the subject. So has said this honorable court by paragraph 2 of rule 36.

Hurd on Habeas Corpus, at section 419, declares the prisoner can not be bailed after final sentence or commitment:

> In *Ex parte Lees* (1 El., Bl. & El., 828) it was held that a writ of habeas corpus is not grantable in general when the party is in execution on a criminal charge after judgment on an indictment according to the terms of the common law.
>
> It is perhaps, therefore, to be accepted as the common law doctrine that if the case has gone to final sentence and the prisoner is taken in execution he can not have bail while he is pursuing measures to have judgment reversed. But this doctrine has been changed, and bail is in proper cases allowed in England by recent statutes, and the same is probably true in many or most of our States. (1 Bishop's Criminal Procedure, 2d ed., sec. 254, and cases there cited.)

Section 5 of the act of Congress above referred to provides for writs of error and appeals, but it does not provide for bail to be given after sentence pending appeal or writ of error. No statute of the United States as we claim provides for it. It is clear that the eighth amendment to the Constitution, which provides excessive bail shall not be required, is not self-executing. It requires the legislation of Congress to make provision for the method of its execution. It is equally clear that this

provision of the Constitution applies to persons who are accused before trial and conviction.

In *Ex parte Scwartz* (2 Tex. Ct. Appls., 75) it is declared:

> The constitutional guaranty of the right of bail is not operative after trial and conviction.

Judge Thompson, in a most able article on the subject of bail, at section 12, page 16, 6 Criminal Law Magazine, says:

> As elsewhere indicated, the *power* to admit to bail—the word "power" being used in the sense of *jurisdiction*—continues even after conviction, and until the prisoner is finally committed in execution; though it is said it is never exercised except with great caution, and then only in respect of minor offences, where the peculiar circumstances of the case render it proper. As a general rule, a man *convicted* of a felony is not bailable, and it may be stated, as a universal rule of common law, that a prisoner committed in execution by one court can not be bailed either by the court which has rendered the judgment, or by any other court; though it is well known that courts before whom prisoners have been tried and convicted of crime, have, in the exercise of a humane discretion, sometimes suspended sentence and released the offender on bail or on his own recognizance to appear when required to receive sentence; the meaning of the proceeding being that he shall not be committed in execution so long as he behaves himself; in other words, it is a sort of judicial "ticket of leave." But the general rule above stated was applied in the King's Bench even in the case of summary convictions by magistrates which had been removed by *certiorari* for the purpose of being quashed. Nor did

the fact that an appeal was given by statute from such a conviction at all affect the rule. The sentence began to run from the date of its being pronounced, and it was deemed no argument that the whole term of imprisonment might have expired before the appeal could be heard. Nor, after conviction and sentence in the King's Bench, could the prisoner be admitted to bail, although the attorney-general had granted a writ of error, unless the attorney-general should consent that he might be bailed. The rule, therefore, was that in all cases the discretionary power of the court to bail the prisoner ceased *after judgment rendered on the verdict.*

The same principle is recognized in *Ex parte Ezell* (40 Tex., 451). That was a case where it was held that a statute denying bail to a prisoner after conviction and pending appeal was valid, and consequently held that the constitutional guaranty of bail did not apply to a case after conviction.

Hurd on Habeas Corpus, 78, 90, and 82, declares the same principle.

Bail taken before and approved by an officer or person unauthorized by law is void. (*Dickinson* v. *State*, 29 N. W. Rep., 184 Sup. Ct. Nebr.)

At the common law a person committed in execution of judgment, or on conviction of any offense, can not be bailed. (Barb. Crim. Law, 576.)

There is a difference at the common law between the status of a party after conviction and before sentence and one who has been convicted and sentenced. If there is had any execution of sentence, the rule was universal at common law that in the case of a felony he was not

bailable, though if he was found guilty and not yet sentenced, under certain circumstances, sentence might be suspended and the prisoner might be bailed.

There seems to be but one line of authorities on this question.

The English common law did not give the right to bail after conviction and sentence, but it is now secured in England by statute. It may be remarked that in the States the admission to bail after conviction and pending appeal only exists in cases of a conviction for a felony, when it is regulated by express statute, and then it is always left discretionary with the trial court.

Davis v. *State*, 6 How. (Miss.), 399.
Ex parte Dyson, 25 Miss., 356.
People v. *Lohman*, 2 Barb., 450.
People v. *Folmsbee*, 60 Barb., 480.
People v. *Bowe*, 58 How. Pr., 393.
State v. *Satterwhite*, 20 S. C., 536.
State v. *Connor*, 2 Bay (S. C.), 34.
State v. *Frink*, 1 Bay (S. C.), 168.
State v. *Ward*, 2 Hawks (N. C.), 443.
State v. *Rutherford*, 1 Hawks, 457.
State v. *Daniel*, 8 Iredell (N. C)., 21.
Miller v. *State*, 15 Fla., 575.
Corbett v. *State*, 24 Ga., 391.
Ex parte Ezell, 40 Tex., 451.
Ex parte Voll, 41 Cal., 29.
Ex parte Smallman, 54 Cal., 35.
Ex parte Marks, 49 Cal., 680.
Ex parte Hoge, 48 Cal., 3.
People v. *Perdue*, 48 Cal., 552.

2d. Am. and Eng. Ency. Law, p. 11, where it is declared that "after sentence or commitment no bail will be allowed."

Church on Habeas Corpus, 419.

1 Bish. Crim. Pr. (3d. Ed.), 254.
Ex parte Percy, 2 Daly, 534.
People v. *Lohman*, 2 Barb., 450.

In about all the States where the right of bail is allowed after conviction it has been given by statute, and as a general rule it has never been exercised after conviction without a statute declaring that it might be given.

Conviction means after the verdict of the jury.

The supreme court of California in *Ex parte Brown* (68 Cal., 176, 183) said:

> We think it settled law in this State by the judgments of the court [in many cases to which the court refers] that this court ought not to admit to bail after a verdict of guilty, unless when circumstances of an extraordinary character had intervened since the conviction.

This is when the statute authorizes bail. This tells us what is the sound discretion to be exercised when there is discretionary power to admit to bail.

The question in the case is not what ought to be, but what is. Does the power exist to bail after conviction and sentence in the class of cases like this of Hudson, either by the common law, the Constitution of the United States, or by the respective statutes passed in pursuance thereof on the subject of bail? Of course, no one could deny that Congress could pass, and perhaps should pass, a law allowing bail after conviction, but has it done so? No provision is made in any of the laws of the United States for bail after conviction in a case of this kind. There is no Federal statute on the subject of bail bonds after conviction and sentence in such a case. (*Ex parte Murphy*, Okl., 29 Pac. Rep., 652.)

HAS THE HONORABLE SUPREME COURT THE POWER BY LAW TO PRESCRIBE PARAGRAPH 2 OF RULE 36.

We submit that it has no such power by the express or implied language of any statute upon the subject of bail; and, further, that the right to bail exists only in cases where the statutes have declared parties entitled to it. Section 1014 declares who may admit to bail for trial. Section 1015 provides what kind of cases *shall be bailable* and section 1016 provides what kind of cases *may be bailable*, but both of the last-named sections have reference to the state of case named in section 1014—that is, to cases before conviction. We think that these sections clearly have reference to bail for parties under arrest before trial. This is the legislative interpretation of this provision of the law, as shown by section 1017, having reference to bail in criminal cases removed from the State courts. This interpretation is also shown by the act of Congress of March 3, 1879, vol. 20, Statutes at Large, 354, relating to appeals and writs of error in criminal cases from the judgment of a district court to take the case to the circuit court. Bail is expressly provided by the second section of such act after conviction and while the case is pending in the appellate court.

Now, a circuit court has the right to make all needful rules and regulations touching its procedure not in conflict with the laws or Constitution of the United States. The Supreme Court has the same power in this regard, and no more. If the Supreme Court can determine when bail shall be given it could so determine the class of cases removed from the State supreme court to it; and the

circuit court, under the provision as to its making needful rules and regulations regulating its method of procedure, could determine that a case taken by writ of error or appeal from the district court to it should be bailable; yet Congress in both of these cases has construed the powers of these courts otherwise, because it has deemed it necessary that the matter of bail in these cases of appeals and writs of error should be determined by positive enactment. The fact that the sections above quoted, relating to the bailing of parties charged with crime, have reference only to crimes before conviction has been determined by judicial action of this honorable court in adopting paragraph 2 of rule 36; for if the right to bail existed by virtue of these sections it was already provided for, and the sections provide who shall take it; and if by the construction of the court these sections did apply to cases of bail after conviction and sentence and pending appeal or writ of error, why prescribe the rule? It would be unnecessary, for there would already be a statute on the right to bail and expressly providing who might take it.

Hence we say that we find in all legislative and judicial interpretations on the question of bail by sections 1014, 1015, and 1016, and these sections of the act we have alluded to in reference to bail after conviction, a legislative intent is expressed. Where that intent is expressed to the extent it is here, and there stops, the conclusion naturally follows that Congress did not intend that the right of bail could be granted in any other cases than those that it has provided for by express enactment. It was scarcely necessary that we should look to legislative or judicial construction of sections 1014, 1015, and

1016, for there is no room for such construction of these sections. Section 1014, in relation to who may arrest, and of parties arrested, among other things declares with reference to the parties to be arrested:

> That he may be arrested and imprisoned agreeably to the usual mode of procedure or process against offenders in such State, and at the expense of the United States, or that he may be bailed, as the case may be, before trial, before such court of the United States as by law has cognizance of the offense. * * *

We submit this is very clear. It clearly has reference to admitting parties to bail before trial. Section 1015 confirms this interpretation, for it says: "Bail *shall be admitted* upon all arrests in criminal cases where the offense is not punishable by death * * *" The difference between this section and section 1016 is that the latter section says that in all cases where parties may be punishable by death they *may be* admitted to bail. Neither section reads "they shall be admitted to bail in cases of appeal or writ of error," but "in cases of arrest." Both sections use the same language when they have reference to the time of bail, to wit, upon all arrests.

Upon the matter of the time of admitting to bail they must have the same construction. It would hardly do to say that the authority to bail in a capital case, as provided in section 1016, would extend to bail after conviction and sentence—that a man convicted and sentenced for murder could be bailed. If we can say, when construing section 1015, that a party can be bailed after conviction and sentence, we must say the same thing when construing section 1016, for precisely the same language is used in each.

The Supreme Court has a right to make and establish all necessary rules for the ordinary conduct of business in said court, and may prescribe the mode and form of procedure so as to obtain the object for which jurisdiction was given, in all cases where Congress has not legislated. It may be remarked, in this connection, that all powers belonging to the courts of the United States must come from the Constitution providing for their establishment, and from acts of Congress passed in pursuance of the Constitution. Is granting bail a necessary rule for the ordinary conduct of business? Is it a mode or form of procedure to be exercised to obtain the object for which jurisdiction was given? Is not bail a legal right, guaranteed by the law-making power? Is it in anywise a rule of practice or procedure? The mere method of granting bail may be a method of procedure, and this, and this only, is what was decided in the case of *United States* v. *Rundlett* (2 Curtis, C. C., 41–45), but when, and in what cases, bail shall be granted is not a mere rule of procedure, and it must be declared by positive enactment of the law-making power. The circuit and district courts, by section 218, Revised Statutes of United States, have the right by rule to regulate their own procedure in all cases not inconsistent with any law of Congress. This power with them is as extensive as the power of the Supreme Court in regard to regulating its rules of procedure. Would this give them the right to admit to bail in any case where Congress had not provided for bail? If the Supreme Court can do it, the circuit and district courts can do it, for the power of one as to making rules governing its procedure is as broad as the power of the other. If the power to bail

exists under the power to prescribe rules of procedure, then why has Congress ever legislated upon the subject of bail after conviction? We submit that the principle seems to be true that under our Government of distributed and defined powers, the right to say when, and in what cases, bail may be taken, must be regulated by the law-making power of the Government. (2 Am. & Eng. Enc. Law, p. 3.)

This authority declares that the giving and taking of bail is now limited, regulated, and controlled by statute. The law making power of the United States, it is submitted, has regarded it as necessary to declare when bail may be taken, as in every case that is generally regarded as bailable Congress has made a provision by legislation for such bail. It happens not to have made any provision in a case like this, and the question turns upon the proposition as to whether or not the power given to the Supreme Court to make rules and regulations governing its practice shall be construed as a power, not to make such rules governing its practice alone, but to make rules declaring the effect of its practice. Even in a civil case the statutes of the United States have declared what shall be the effect of an appeal or writ of error in such cases, and what shall be done to secure a supersedeas. If it is deemed by the law-making power in a civil suit affecting property that express Congressional legislation shall provide for stay of execution on appeal or writ of error, and for giving of bond to secure such stay, it seems that the reason for the express power to admit to bail in a criminal case, where a man's life has been jeopardized, as was done in this case by the act of Hudson, is much stronger than

in the case of a civil proceeding, as affording security and safety to innocent human life by the certain enforcement of the criminal law of the land, is more important than protecting the mere property rights of the citizen.

If the Supreme Court has no right to provide by rule for bail after conviction and sentence, and pending an appeal or writ of error, in a case like this, then all bonds taken under such rule are void, and bail would amount to an absolute discharge for all time from custody in a majority of cases, as men who may be guilty are prone to stay away from court when they do not have to go to them and when there is no obligation upon their sureties to take them there. We submit that bail is a great fundamental right to be provided for by act of Congress only, and unless Congress has provided for its being taken it can not be taken; that the power to provide when, by whom, and how it shall be taken is a legislative power that must be exercised by that branch of the Government which possesses this power.

Then, to summarize, we submit this proceeding must be dismissed for the following reasons, any one of which is sufficient to require its dismissal:

(1) Because petitioner has not shown a clear and unquestioned right to the remedy.

(2) That mandamus can not issue if other remedy exists.

(3) Writ can not issue to control judicial discretion.

(4) Mandamus does not lie to correct alleged errors by inferior courts in the exercise of judicial discretion.

(5) Respondent can not be compelled by mandamus to approve an invalid bond.

(6) Mr. Justice White, when he said in his order "subject to the approval of district judge," did not intend to take away the discretion of said judge. He could not take away such discretion.

(7) Mr. Justice White could not, under paragraph 2 of rule 36, make an order admitting to bail until citation served.

(8) A bond taken under it, the same would be void.

(9) Bonds should not be taken under such order.

(10) Trial court alone should be responsible for taking bail bonds.

(11) That this honorable Supreme Court of the United States has no power by law to prescribe paragraph 2, rule 36, in relation to bail, for Congress alone can say when bail shall be taken, and it has not said that it may be taken in a case like that of Hudson.

Respectfully submitted.

ISAAC C. PARKER.